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NO. 94-6790

In The Supreme Court of the United States

October Term, 1994

HARVEY F. GARLOTTE,
PETITIONER

VERSUS

KIRK FORDICE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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34 pp

QUESTIONS PRESENTED

Whether a prisoner serving a series of consecutive sentences fails to meet the "in custody" requirement for purposes of 28 U.S.C. § 2241 (c) (3) when the first of two consecutive sentences has been fully served, and whether the court below correctly held that it lacked jurisdiction to hear petitioner's challenge to the first of two consecutive sentences which challenge was not filed until after the first sentence had expired.

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No. 94-6790

In the

Supreme Court of the United States

October Term, 1994

HARVEY F. GARLOTTE,

Petitioner,

v.

KIRK FORDICE,
GOVERNOR OF MISSISSIPPI,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of Harvey F. Garlotte for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein that court affirmed the denial of habeas corpus relief as to his conviction for possession for marijuana with intent to deliver.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported as *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). Joint Appendix (JA) at 25-29. The June 3, 1992, Order and Judgment of the United States District Court for the Southern

District of Mississippi are found at JA 18 & 19. The Report and Recommendation of the Magistrate Judge is found at JA 5-17.

JURISDICTION

The jurisdiction of this Court is invoked under authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254; Miss. Code Ann. § 47-5-138 (Supp. 1994); Miss. Code Ann. § 47-5-139 (Supp. 1994); Miss. Code Ann. § 47-5-142 (Supp. 1994); and Miss. Code Ann. § 47-7-3 (1) (Supp. 1994), are reproduced in Appendix A to the Brief for Petitioner.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

On September 16, 1985, Petitioner-Appellant, Harvey F. Garlotte entered pleas of guilty to one count of marijuana possession in an amount less than an ounce with intent to deliver and to two counts of murder. He was subsequently sentenced to serve terms of three (3) years pursuant to the marijuana charge and two concurrent life sentences pursuant to the charges of murder. The concurrent life sentences were to run consecutive with the three (3) year sentence imposed for marijuana possession. Although three (3) separate pleas were entered on September 16, 1985, the present appeal is

targeted exclusively at the plea of guilty to possession of marijuana with intent to deliver.

Garlotte filed a motion to vacate his plea of guilty to marijuana possession in the Circuit Court of Lamar County, Mississippi, under the provisions of Miss. Code Ann. § 99-39-1, et seq. (Supp. 1994). This post-conviction petition was denied by the circuit court as being "plainly" without merit on November 3, 1986.

On May 18, 1987, petitioner appealed this denial of post-conviction relief to the Mississippi Supreme Court raising five main issues. On August 10, 1988, the Mississippi Supreme Court denied the "facially meritless motion for post-conviction relief" in a written opinion. *Garlotte v. State*, 530 So.2d 693 (Miss. 1988). A petition for rehearing was denied on September 28, 1988.

On or about October 20, 1989, petitioner sought relief by means of a Petition for Writ of Habeas Corpus filed with the United States District Court for the Southern District of Mississippi, Hattiesburg Division raising nine claims. On November 17, 1989, respondents filed a Motion to Dismiss for Failure to Exhaust, and on August 29, 1990, the magistrate judge recommended that the habeas petition be dismissed without prejudice. On June 25, 1991, after reviewing an Order from the Mississippi Supreme Court, the District Court remanded to the Magistrate Judge "for reconsideration." Respondents, on July 29, 1991, filed a Brief on Remand submitting that petitioner "seem[ed] to have exhausted his state court remedies," stating:

> The reason for the failure of the state to discover these two grounds is that they were not included in the

application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleading filed in another case.

On February 13, 1992, the magistrate judge,[1] after reviewing the case on its merits, filed his Report and Recommendation, and recommended that the petition for writ of habeas corpus be denied. JA 5-17. After the Report and Recommendation was issued respondent filed Respondent's Clarification of Exhaustion Issue in Report and Recommendation of United States Magistrate Judge on February 19, 1992. JA 20-23. After fully reviewing the Magistrate Judge's report and recommendation, the objections of petitioner and the response of the State, the District Court, on June 3, 1992, adopted the Report and Recommendation as the finding of the Court and dismissed the habeas petition. An order and judgment were entered as required by Rule 58, Fed.R.Civ.P. JA 18 & 19.

On August 4, 1993, the Court of Appeals for the Fifth Circuit ordered the district court to supplement the record with the State's Brief on Remand. JA 3-4. On March 3, 1994, a certificate of probable cause was granted by the Fifth Circuit. After briefing, on August 19, 1994, the Fifth Circuit affirmed the district court's dismissal, but on the separate ground that the district court lacked jurisdiction pursuant to 28 U.S.C. § 2254. *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994).

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[1]At this point, the instant case had been assigned to all three Southern District magistrate judges at different times.

B. Statement of Facts.

In *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994), the court below summarized the facts as follows:

> In 1985 Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.
>
> In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.
>
> On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it,

dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

Garlotte, 29 F.3d at 217.

SUMMARY OF ARGUMENT

The Fifth Circuit properly interpreted this Court's decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), in affirming the district court's dismissal of the writ of habeas corpus due to lack of jurisdiction as petitioner no longer met the "in custody" requirement for purposes of 28 U.S.C. § 2241(c)(3). Petitioner's three (3) year sentence for possession of marijuana with intent to deliver was fully expired before he filed his petition for writ of habeas corpus challenging that conviction. Once a sentence of a series of consecutive sentences has expired it can not be collaterally attacked as the convict is no longer "in custody" for the purposes of § 2241(c)(3). In *Maleng v. Cook*, 490 U.S. 488 (1989), held that once a conviction is discharged a petitioner is no longer "in custody" for the purposes of § 2241 (c) (3).

The Court in *Peyton*, was concerned with the expeditious determination of habeas petitions on convictions to be served in the future. The reasoning of *Peyton* does not logically apply in reverse. When one of several consecutive sentences has expired the convict has already had the opportunity to challenge that conviction while in custody on that conviction. The goal of speedy determination of future convictions is not present in this situation. In fact, the converse of this goal would result. To adopt petitioner's position would allow petitioner's to withhold claims against the validity of convictions for years. When these delayed claims are then brought the whole reason for *Peyton* is

undermined. Under Mississippi law consecutive sentences, whether imposed at the same time or at different times, are treated as separate sentences and not as a unitary sentence. *Williams v. Puckett*, 634 So.2d 496 (Miss. 1993). Garlotte is not "in custody" pursuant to the marijuana conviction for purposes of § 2241 (c) (3).

ARGUMENT

I. For Purposes of 28 U.S.C. § 2241 (c)(3), A Prisoner Serving Consecutive Prison Terms On Separate Counts Of Conviction Is Not "In Custody" Throughout The Aggregate Duration Of Those Terms So As To Allow An Attack Against One Of The Consecutive Prison Terms Which Has Fully Expired.

In *Peyton v. Rowe*, 391 U.S. 54 (1968), this Court indeed held that a prisoner serving consecutive sentences is "'in custody' under any one of them for purposes of § 2241 (c)(3)." 391 U.S. at 67. However, the facts upon which *Peyton* rests are wholly distinguishable from those presented in the instant case. In *Peyton*, the petitioner had not yet begun to serve the prison term imposed for the challenged conviction. In contrast, Garlotte had already fully served the prison term imposed for the challenged marijuana conviction at the time he filed his petition for writ of habeas corpus. In applying the rationale of *Peyton*, the lower federal courts have reached differing conclusions when presented with a fact situation such as that presented here. Because of this conflict of the circuits this Court must resolve this question.

The Fifth Circuit, in affirming the district court's dismissal of the writ of habeas corpus in this case, stated:

> In *Peyton*, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton,*, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng*. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.
>
> *Garlotte*, 29 F.3d at 218.

The net result of *Peyton* is simply that a prisoner "in custody" under one sentence may attack a sentence he is scheduled to serve in the future. Consequently, the Fifth Circuit did not err in finding that Garlotte failed to meet the jurisdictional "in custody" requirement of § 2241 (c)(3).

A. A Fully Served Consecutive Sentence Must Not Be Aggregated With Other Consecutive Sentences For Purposes Of Applying § 2241 (c)(3)'s In Custody Requirement.

In *Peyton*, this Court addressed "whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claims that a sentence that he is scheduled to serve in the future is invalid because of a deprivation of rights guaranteed by the constitution." 391 U.S. at 55. In deciding *Peyton*, this Court revisited the decision in *McNally v. Hill*, 293 U.S. 131

(1934), to determine what is sufficient to constitute being "in custody" for habeas corpus purposes. In *McNally*, the Court held that "the habeas corpus statute does not authorize attacks upon future consecutive sentences." *Id.* The *Peyton* Court held that the decision in *McNally* was "compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in the federal courts." *Id.*

The driving force that underscores the entire *Peyton* holding is the "harshness of a rule which may delay determination of federal claims for decades." *Id.* at 61. The Court emphasized that it could not require a petitioner to wait to meet the "in custody" requirement defined by the *McNally* Court because "[b]y that time, dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." *Peyton* at 62. The Court went on to say:

> Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. As the Court of Appeals observed:
>
> > Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater lapse of time the more unlikely it becomes that the state could

> reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. 383 F.2d at 715.

391 U.S. at 62-63 [citations omitted].

While consecutive prison sentences currently being served or yet to be served are unitary and should be aggregated, once any one of such consecutive sentences has been fully served it is no longer amenable to a habeas challenge because the prisoner is no longer "in custody" pursuant to such a fully served sentence. This logical reasoning is clearly consistent with the rationale of *Peyton*, which allowed the prisoner to attack a sentence yet to be served in order to facilitate judicial disposition of habeas claims before the passage of time could hinder assertion or defense of such claims. No artificial separation of terms is necessary to this end where as in the case *sub judice*, the sentence imposed for the challenged conviction has unequivocally expired prior to the habeas attack.

Other circuits have considered this question with conflicting results. Although the opinion is unpublished, the Court of Appeals for the Sixth Circuit offers this persuasive reasoning consistent with the holding of the Fifth Circuit:

> We think that the rationale of *Peyton* and the harm which it sought to alleviate apply with equal force to the situation in which a prisoner waits to bring his petition until the sentence which he seeks to attack has expired. Indeed, one of the situations of prejudice

> enumerated in *Peyton* is the very claim being pursued by the petitioner in this--that he was coerced into entering a guilty plea. And as the Supreme Court quoted with approval from the appellate court opinion in *Peyton* "If the allegations of his petition are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." *Id.* at 62. That prejudice is no less inconsistent with the purposes of the writ merely because it results from [*8] time which has already passed before the petition may be filed.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160 at *7-8 (6th Cir. 1994).

The United States Court of Appeals for the Eighth Circuit was presented with a similar question in *Allen v. Dowd*, 964 F.2d 745 (8th Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 335, 121 L.Ed.2d 253 (1992). There Allen argued that while his earlier expired sentence was not used to enhance the sentence he was currently serving, the earlier conviction affected his current sentence because it delayed his release date. The Eighth Circuit, held:

> His argument overlooks the fact that nowhere in his petition does he challenge his later conviction. Allen expressly restricts himself to challenging the 1982 conviction for receiving stolen property. In *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989) (per curiam), we affirmed a dismissal where the petitioner had served the sentence challenged in his habeas petition and had failed to assert in his petition an attack against a current sentence, even though he argued on

> appeal that the earlier conviction resulted in an enhancement of his later sentence. Upholding the district court's finding that the petitioner did not satisfy the "in custody requirement," we concluded: "it is still open to appellant to challenge his [later] sentence, and to assert as a ground for that challenge the invalidity of the previous, underlying 1982 conviction." *Id.* at 727.
>
> We thus reject Allen's argument that he is entitled to proceed under *Maleng*. He is, of course, entitled to file a new petition attacking the conviction for which he is now in custody, but we also observe that he must abide by the usual requirement of exhaustion of state remedies. *See Flittie v. Solem*, 882 F.2d 325, 328 & n. 2 (8th Cir. 1989) (Bean, J., concurring specially).

964 F.2d at 746.

When considering a challenge to a federal conviction under 28 U.S.C. § 2255, the Court of Appeals for the Tenth Circuit, in *United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994), dismissed a habeas challenge for lack of jurisdiction. Bustillos was sentenced to serve consecutive sentences of three (3) years and five (5) years. These sentences were imposed on the same day for separate convictions. Bustillos filed a habeas petition challenging the conviction resulting in the three (3) years sentence some six (6) years after the sentences were imposed. On appeal, like in the case at bar, the government challenged the subject matter jurisdiction of the court to hear the habeas challenge on the grounds that the three (3) year sentence had been fully served when the habeas petition was filed. The court held that it was without

jurisdiction to hear the case and dismissed the case for lack of jurisdiction. 31 F.3d at 934.

At odds with these rulings are decisions from the Court of Appeals for the Fourth, Seventh and Eleventh Circuits. *See Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991); *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990). The Fourth and Eleventh Circuits interpret *Peyton* to hold that once a petitioner is in custody on consecutive sentences he may challenge any one of them at any time no matter whether that sentence has expired or not. The Seventh Circuit in *Fawcett* equated consecutive sentences with enhanced sentences and held that the *Peyton* rationale applied because "a consecutive sentence uses the first conviction to postpone release on the second." 962 F.2d at 618. These three circuits base their decisions on the single sentence from *Peyton* stating that "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of" collateral attack. None of these three circuits makes any analysis of the reason for the holding in *Peyton*.

Respondent admits that the earlier of consecutive sentences determines the timing of commencement and expiration of subsequent consecutive sentences, but only until the earlier sentences have either expired or been vacated. Once an earlier consecutive sentence has expired or been vacated, the next in sequence of the remaining consecutive sentences determines the date of commencement and expiration of any subsequent consecutive sentences.

In *Peyton*, the challenged conviction was a sentence that had not yet commenced. That sentence continued to determine the length of remaining confinement at the time the habeas petition was filed. The challenge to Rowe's conviction

with its yet-to-be-served sentence was asserted in a timely fashion and could have been brought at that time regardless of whether the other consecutive sentences had been imposed. Garlotte, on the other hand, would be completely foreclosed from bringing his habeas petition at this point in time, i.e., after expiration of his sentence, were it not for the remaining consecutive sentences.

The *Peyton* Court wrote:

> *McNally* is also at odds with the purpose of the writ of habeas corpus in another respect. As noted above, a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty. Calendar congestion, considerations of federalism, see, e.g., *Fay v. Noia*, 372 U.S. at 415-420, 9 L.Ed.2d at 854-857; *Ex Parte Royale*, 117 U.S. 241, 29 L.Ed.2d 868, 6 S.Ct. 734 (1886), and the exigencies of appellate review account for largely unavoidable delays in the processing of criminal cases. But the prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men. Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time.

Peyton at 63-64.

The basis for the holding of *Peyton* is to allow a habeas petitioner to bring his challenge to future sentences at the earliest possible time, not to delay them until after they expire. The reasoning of the Fifth, Sixth, Eighth, and Tenth Circuits is the more logically in line with the rationale of *Peyton*. Respondent urges this Court to decline Petitioner's invitation to reward multiple offenders with what would be, in effect, an extended time period in which to file a habeas petition on a conviction whose sentence had expired simply because the conviction and sentence were imposed to run in a consecutive manner.

B. Mississippi Law Confirms That Garlotte Is Not Presently "In Custody" Under The Fully Expired Sentence.

Petitioner argues that Mississippi treats consecutive sentences as a unitary term of confinement. The respondent submits that state law is not controlling on the issue of jurisdiction under 28 U.S.C. § 2254. In defense of a challenge to the jurisdiction of the court to hear a habeas petition, Fernando Bustillos claimed he was "in custody" arguing that 18 U.S.C. § 3584(c) required the Federal Bureau of Prisons to treat multiple terms of imprisonment as a "single, aggregate term of imprisonment." *Bustillos*, 31 F.3d at 934. He argued the language of the statute supported his argument that he was "in custody" and could challenge a conviction after the sentence had expired. The Tenth Circuit rejected this argument first by stating that the statute did not apply retroactively to Bustillos. Further, the Tenth Circuit stated:

> Moreover, the Federal Bureau of Prison's treatment of multiple sentences for administrative purposes is not

> binding on a court in determining whether it has jurisdiction to address a collateral challenge filed pursuant to § 2255.
>
> 31 F.3d at 934.

Likewise, respondent would submit that the manner in which Mississippi treats consecutive sentences is not controlling on whether or not a federal court can entertain a collateral challenge under § 2254.

Moreover, petitioner's argument that Mississippi law treats consecutive sentences as a unitary term of confinement is completely refuted by the decision of the Mississippi Supreme Court in *Williams v. Puckett*, 634 So.2d 496 (Miss. 1993). There the state court held:

> More recently, in *Milam v. State*, 578 So.2d 272 (Miss. 1991), this Court had occasion to speak to the question of the proper treatment of consecutive sentences, one of which is a mandatory sentence for which no parole is available. . . .
>
> We held that Milam's parole date, without reference to good time, had been calculated in accordance with Mississippi law. *Id.* at 273-74. The Court said in part:
>
> > It goes without saying that, when a person is by express order providing therefor sentenced to serve consecutive terms, imprisonment on the second, or each subsequent conviction, shall commence at the completion of the service of the term for the preceding

> conviction. Miss. Code Ann. § 99-19-21 (1972). His parole eligibility is a function of the law's response to those consecutive sentences. *Davis v. State*, 429 So.2d 262, 263 (Miss. 1983).

Id. at 274. . . .

Williams claims that the wording of § 47-7-3(1)(d), would indicate that he is entitled to parole on these consecutive sentences after the service of ten years. Specifically, he focuses upon the phrase "term or terms" as used in that statute providing that one sentenced for robbery for a term or terms in excess of ten years shall be eligible for parole in ten years. He suggest that his robbery sentence in combination with his forgery sentence are "terms" within the meaning of the statute and that the statute dictates that he is eligible for parole in ten years. This is not an issue discussed in *Taylor, Milam* or *Davis*. Interpretation of this language was the genesis of the dispute presented in *Taylor* but the soundness of the agency interpretation was not at issue.

We do not consider this an open issue, however, given the fact that the interpretation given the statute by the agency chosen to administer it should be accorded deference. *Gill v. Dept. of Wildlife Conservation*, 574 So.2d 586, 593 (Miss. 1990). Here, the parole board interpretation has operated with our implicit approval for fifteen years. *See, Taylor*, 365 So.2d 621. If that interpretation is in error it should be corrected by the legislature. Given the law as presently interpreted the Department of Corrections

> has correctly calculated Williams' date of eligibility for parole.
>
> 624 So.2d at 499.

In *Williams*, the Mississippi Supreme Court made it clear that consecutive sentences are treated separately for parole purposes. They are not treated as a unitary sentence.

Under the state law, as espoused by the Mississippi Supreme Court, Garlotte was required to serve at least ten months on his marijuana conviction before becoming eligible for parole. Miss. Code Ann. § 47-7-3 (1) (c) (Supp. 1994).[2] This sub-section reads:

> (c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) *ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years*; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years; [Emphasis added].
>
> Petitioner's Appendix at 5a.

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[2]This code sub-section has remained unchanged since the date of petitioner's conviction and sentence.

Wholly separate from this ten month requirement, Garlotte must serve at least ten years on his concurrent life sentences before becoming eligible for parole. Miss. Code Ann. §47-7-3 (1) (Supp. 1994). Petitioner's Appendix at 5a.

Garlotte relies on two Sentence Computation Date Sheets furnished him by the Mississippi Department of Corrections (DOC) as proof of the unitary nature of the sentences. One of these sheets, dated October 19, 1988, sets his parole eligibility date at May 1, 1996. JA 52. The second, dated November 13, 1992, is accompanied by a Sentence Computation Record sheet, and sets his parole eligibility date for December 2, 1995. He makes much of the difference in the parole eligibility date in the two separate documents. However, when we look to these time computation records we find an easy answer to the difference. The first sheet was prepared before the 1992 amendment to Miss. Code Ann. § 47-5-138 (Supp. 1994), the second after.[3] The net effect of the retroactive application of the changes in the earned time provisions of § 47-5-138, was to advance Garlotte's parole eligibility date from May 1, 1996 to December 2, 1995. Garlotte was given the benefit of the new provisions of §47-5-138 in the computation of his parole eligibility date for the concurrent life sentences.

On September 16, 1985, Garlotte was convicted and sentenced to serve three years in the custody of the DOC. This logically would make his discharge date for that crime September 15, 1988. That date was reduced by the application of certain statutory provisions, some that were applied retroactively. Looking to the computations by the

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[3]This code section is that referred to as Senate Bill #2030 on the Sentence Computation Record. JA 54.

DOC found in the Sentence Computation Record complied on November 13, 1992, (JA 54) we find that Garlotte's discharge date was first determined to be March 11, 1987. This date was figured from September 16, 1985, the date he was received as an inmate with the DOC. This computation reflects the credit for one-half (1/2) of the period of confinement imposed by the court provided for by the retroactive application of § 47-5-138. Then an additional one hundred and three (103) days was subtracted from the total for the time Garlotte spent in jail awaiting trial. This made his discharge date November 28, 1986. This was then reduced by one hundred eighty (1980) days of meritorious earned time pursuant to Miss. Code Ann. § 47-5-142 (Supp. 1994). This made Garlotte eligible for parole on the marijuana sentence on December 2, 1986.[4]

Since Garlotte had consecutive sentences to serve he was not physically released from custody after his marijuana conviction expired; instead, he served the entire sentence imposed, as reduced by statutory earned time. The sentence on the marijuana conviction expired, according to the calculations of the Mississippi DOC, on June 1, 1986. Garlotte is now in custody on the concurrent life sentences imposed for the murder convictions. Just as the time has expired for Garlotte to be paroled on the marijuana conviction or to bring a state post-conviction collateral relief action under

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[4]According to the Mississippi Department of Corrections, Records Department, the petitioner's earliest parole eligibility date is December 2, 1995. JA 54. While inquiring into the exact meaning of the dates listed in this computation record counsel discovered that Garlotte's earliest parole date was incorrectly figured as meritorious earned time was included in the calculation of earliest parole date on the marijuana sentence. His earliest parole date will actually be sixty-two (62) days later than listed on the sheet.

Miss. Code Ann. § 99-39-1, *et seq.*,[5] the time has similarly expired for Garlotte to bring a federal habeas attack against his expired marijuana conviction.

II. *Maleng v. Cook* Forecloses Habeas Jurisdiction Over Convictions That Have Fully Expired.

The Fifth Circuit correctly determined that *Maleng v. Cook*, 490 U.S. 488 (1989), precludes a federal collateral challenge to Garlotte's marijuana conviction because that sentence had expired. *Garlotte*, 29 F.3d at 217. The court below points out in its opinion:

> Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir. 1993), *quoting Young v. Lynaugh*, 821 F.2d 1133, 1137 (5th Cir. 1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 1040, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically he contends that but for his marijuana conviction, he

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[5]Assuming that a post-conviction collateral relief action had not already been brought in the state court.

would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Capetta*, however, the Supreme Court stated in *Maleng*:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925.

Garlotte, 29 F.3d at 218. The Fifth Circuit followed the rule established by *Maleng* in Garlotte's case, at least to the extent that *Maleng* and *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), are inconsistent.

The Court went on to explain that Garlotte's contention--that because his parole consideration date was delayed by the marijuana conviction the requisite nexus between the marijuana conviction and the murder conviction existed--was without merit. Citing *Maleng*, the Fifth Circuit found that because "Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a 'positive and demonstrable' nexus between

the marijuana conviction and the murder sentences he is now serving in order to meet the requirement of the *Maleng* exception established by this Court in *Willis*." *Garlotte*, 29 F.3d at 218.

As in *Maleng*, any indirect effect of Garlotte's expired sentence on his release date is merely a "collateral consequence" of the marijuana conviction. *Maleng*, at 492-93. Garlotte can not be said to suffer any "present restraint" from the marijuana conviction as the sentence imposed for that conviction has fully expired. If Garlotte had been released for even one day between the expiration of his sentence for the marijuana conviction prior to imposition and commencement of his concurrent life sentences, he would clearly be precluded from collaterally challenging the marijuana conviction. Just because the marijuana sentence was to be served prior to the murder sentences should not be held to grant him the right to challenge that expired sentence.

Additionally, no other collateral consequences are created by the expired sentence. As noted under the rationale of the Sixth Circuit in the unpublished opinion in *Johnson v. O'Dea*:

> The Supreme Court's ruling in *Maleng v. Cook*, 490 U.S. 488, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989), has limited any argument that *Peyton* can be read beyond overruling *McNally* and its rule on prematurity. In *Maleng*, the Supreme Court held that a habeas petitioner does not remain "in custody" after a sentence has fully expired merely because the prior conviction will be used to enhance a sentence imposed for subsequent crimes for which petitioner may be convicted. *Id.* at 492. Johnson's two year sentence,

along with the time spent on parole for his 1980 conviction, clearly expired before 1990. The record does not indicate that any of Johnson's subsequent sentences were exacerbated by his 1980 conviction. Thus, even a narrow application of *Maleng* results in a finding that Johnson is not suffering any collateral consequences for his 1980 conviction and is thus, not "in custody." [n2]

[n2] We recognize that two other circuits have taken a contrary position holding that *Maleng v. Cook, supra*, is inapposite and that the "in custody" issue in the context of expired sentences is governed by *Peyton*. We find theses cases unpersuasive. *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992) simply cited *Peyton v. Rowe, supra*, for the proposition that a prisoner in custody on any of consecutive sentences is in custody on all of them, but did not mention or discuss the actual facts, rationale and entire holding of *Peyton*. *Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991) contains some discussion, but concludes that the difference between Rowe's attempt to challenge a sentence which he had not yet begun to serve and Bernard's attempt to challenge a consecutive sentence he had already served was "irrelevant," *id.* at 55, and that *Peyton* had held "dispositive the fact that the Virginia parole statute provided that Rowe's parole eligibility was to be determined on the basis of an aggregate sentence of fifty years, the total of his thirty-year and twenty-year sentences." *Id.* at 55. Without commenting on whether the Virginia parole statute was "dispositive," we note that the *Peyton* Court discussed that statute solely in terms of the need for habeas petitioners to be able to attack sentences not yet being

served because of the damage to their claims which the passage of time might do.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160, at *9.

Consequently, the delay in commencement of Garlotte's life sentences and delay in his parole eligibility date for those life sentences is at most a collateral consequence of the expired marijuana sentence. While it is true that had Garlotte successfully challenged his marijuana conviction prior to expiration of its sentence, commencement of his life sentences and his parole eligibility date on those sentences would have been advanced. Nonetheless, Garlotte's failure to assert a habeas challenge to the marijuana conviction while "in custody" for that conviction should not be fostered by this Court by a finding of "present restraint" directly attributable to his expired sentence. Any present restraint suffered by Garlotte is only attributable to his life sentences. Garlotte is not presently restrained by his marijuana sentence; is not encumbered by any collateral consequences of that expired sentence; and, therefore cannot be "in custody" for purposes of challenging the marijuana conviction.

III. Recognition of Habeas Jurisdiction Over the Earlier Of Garlotte's Consecutive Sentences Would Be An Unwarranted Expansion of the Remedial Purposes Of The Writ.

While respondent acknowledges that the statutory grant of habeas jurisdiction is broadly construed to effectuate its remedial purposes. Refusal to expand habeas jurisdiction to allow challenges to a conviction after expiration of its sentence would not deny a federal remedy to one with a constitutional

claim to any greater extent than do procedural bars. The remedy provided by habeas corpus is available to prisoners serving consecutive sentences, just as it was available to Garlotte, so long as they assert the challenge in a manner sufficiently timely to invoke habeas jurisdiction, *i.e.*, while "in custody" for the conviction challenged.

At the time Garlotte filed his habeas petition his marijuana sentence had already expired. Consequently, his confinement at the time he filed his petition was not attributable to the marijuana conviction, he was not "in custody" for purposes of habeas jurisdiction, and jurisdiction could not properly attach. As Garlotte is currently serving his concurrent life sentences, his marijuana conviction does not continue to postpone commencement of these life sentences. *Cf. Carafas v. LaVallee*, 391 U.S. 234 (1968) (habeas jurisdiction will not be extinguished by expiration of sentence following initial attachment of jurisdiction).

Additionally, the Sixth Circuit had this to say regarding the expansion of habeas jurisdiction now urged by Garlotte:

> In dealing with the application of *Peyton* to past confinements, this Court has stated:
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> > Apparently, petitioner's reasoning is that if under *Peyton* the "in custody" requirement must be read to allow prisoners to use habeas corpus petitions to challenge future confinement, the same analysis should logically work in reverse to compel the conclusion that the "in custody" language permits prisoners to challenge past confinement.

> Neither the language of the statute nor the manifest purpose of the writ goes that far. *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984). This Court has clearly indicated an intention not to "open the door" to the creation of jurisdiction for sentences which have been fully served. *Id.* n 1.
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> n[1] This Court Circuit declined to follow the reasoning set forth by the Seventh circuit in *Harrison v. Indiana*, 697 F.2d 115 (7th Cir. 1979). In *Harrison* the court held that since the first sentence delayed the commencement of the second sentence and thus delayed the petitioner's release date, the petitioner was in custody for the first sentence so long as he remained imprisoned.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160, at *8.

To demonstrate the flaw in the reasoning of the Fourth, Seventh and Eleventh Circuits, Respondent would pose this example. A person is convicted of four murders and is sentenced to four consecutive life sentences for those murders. Under Mississippi law he is required to serve a minimum of ten (10) years on each before he becomes eligible for parole. He could wait until he has served thirty-one (31) years and then bring a habeas challenge to the first two convictions even though the sentences on these convictions had expired. This in inapposite with the rationale of *Peyton* which is based on the need for expeditious adjudication of collateral challenges to state court convictions.

Further expansion of habeas jurisdiction to cover a conviction when the sentence for that conviction has fully

expired prior to the prisoner's filing of a habeas claim would not further the remedial purposes of the writ. Rather, it would encourage and reward delay in the assertion of habeas challenges, contrary to the *Peyton* rationale of speedy judicial disposition.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this Court affirm the decision below.

Respectfully submitted,

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